At the outset, we note that regulation may not be necessary to restrain the prices of at least some of the equipment required to receive basic cable service. Specifically, both remotes and converters may be acquired from consumer electronics outlets like Radio Shack. Provided that the consumer understands that converters and remotes can be purchased in any number of places, the prices for such equipment should be competitively determined and therefore reflect the cost of the outlet in providing them. As an alternative to price regulation for this easily available equipment, the Commission need only be concerned with assessing any informational needs that consumers may have. As a result, the Commission could focus only on determining the costs of equipment that cannot be purchased from competing vendors.

Cost-based rates for such equipment could be estimated in a number of ways. For example, one could have the industry perform a "special study" to determine these costs, including a competitive return, for equipment required for basic service. While such a study is qualitatively plagued by the same problems as those discussed in connection with cost-of-service regulation of basic rates, the distortions will tend to be small to the extent that these costs are a relatively small share of total costs.

Alternatively, the Commission could select a competitive benchmark. Most obviously, the Commission could use the prices charged by systems that are deemed subject to effective

competition.[34] While the prices for basic service of effectively competitive systems may vary considerably depending on the characteristics of the system, there is no reason to believe that this kind of variation characterizes installation and equipment charges.[35] As another example, the Commission could presume that installation and equipment rates in 1986 were effectively regulated at cost and inflate those rates to their 1992 levels.

Regardless of the method chosen, such estimates will still be quite imprecise. To the extent that many systems find that costs of improving service are greater than the regulated price they are permitted to charge, innovations in the way basic service channels are distributed to consumers (such as those that may result from advances in compression technology) will be discouraged. Thus, we recommend that the Commission select the benchmark to encourage operators to invest in new ways of delivering basic service.

As with basic rates, once the Commission sets the regulated equipment rates, these rates will have to be adjusted over time. The most obvious way to make this adjustment is to use the increase in the charges of effectively competitive systems. Alternatively, the Commission could use a regional CPI to adjust the rate over

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[34]Such a use would presume that operators of these systems could not charge more than the incremental cost of the equipment.

[35]It is true that installation charges may vary across effectively competitive systems because of variations in homes passed per mile, but accounting for these differences may be much simpler than accounting for differences in the basic rates of these systems.

time, or tie the allowable increases to the increases in the costs of installation and equipment of unaffiliated systems. Because equipment costs account for a relatively small percentage of total costs, the Commission might want to choose a relatively straightforward approach to adjustment.

Finally, if the Commission declines to use the installation and equipment price increases of effectively competitive systems to adjust the regulated price, the Commission will likely have to recalculate the benchmark level to ensure that installation and equipment prices continue to be aligned with costs. As in the discussion of basic rate regulation, the shorter is the lag in revisions in response to the operator's profit performance, the smaller will be the operator's incentives to reduce the costs of installation and equipment acquisition and distribution.

COMMISSION OVERSIGHT OF CABLE PROGRAMMING SERVICE RATES

In its Notice, the Commission seems to suggest that Congress may have intended the regulation of cable programming services to be as stringent as that for basic cable services. By contrast, many parties in this proceeding, and the language of the 1992 Cable Act, argue that Congress intended that the Commission's oversight of rates for cable programming services be considerably more relaxed than that for basic cable service. To the extent that the Commission can choose a different regulatory regime for cable programming services, there are sound economic policy reasons for

the FCC to limit its oversight to those few cable systems whose rates seem excessive.

As noted earlier, the early efforts of the FCC designed to restrict the growth of cable included limitations on the revenues that cable operators could acquire through advertising or direct subscriber fees. These limitations were based on a realization that cable operators would be a more effective competitive force if they could acquire additional programming.

Almost as quickly as the FCC began dismantling these limitations, municipal authorities filled the regulatory void, in part through the regulation of basic cable rates and other aspects of cable service. As a result, the ability of operators to offer consumers more costly but more highly valued programming was constrained and the development of alternative cable programming services was repressed.

After the implementation of the 1984 Cable Act, the availability of cable programming services and cable penetration grew substantially. As we noted earlier, the evidence suggests that much of the enhanced consumer satisfaction from cable service was due to deregulation. This historical sensitivity of cable programming services to regulatory restrictions, combined with what may be substantial new restraints on basic cable rates, suggests that rigidly regulating cable programming service rates may limit further gains to consumers or even reverse past gains.

The evidence indicates that the rates operators are permitted to charge can have a substantial effect on the amount, nature, and

quality of the program services they are willing to offer to subscribers. In the case of basic cable services, the availability of retransmitted local broadcast signals and public, educational, and governmental channels will be relatively insensitive to the rates that cable operators are permitted to charge.[36]

By contrast, for cable programming services, where programming is created primarily for distribution over cable, the amount and nature of such programming will be affected significantly by the rates that cable operators are permitted to charge for these services. If rates are set too low, the amount and quality of the programming on these services will be adversely affected.

While we have suggested that the Commission limit the disincentives operators may have to enhance the quality of their basic tiers subject to rate regulation, there will invariably be new or additional services, which, while highly valued by consumers, will be too costly to provide at the regulated basic rates. Put simply, no basic rate regulation scheme is likely to accommodate the diversity in cable programming services. If the Commission were to constrain severely the rates for cable programming services as well as those for basic service, cable systems could be expected to adapt by changing the nature of their

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[36]It is a separate matter whether the rates are sufficient to permit cable operators to recover the costs of the construction and operation of their physical plants. Moreover, restrictions on the rates for basic services will affect the amounts that operators are willing to pay to obtain consent to retransmit local broadcast signals.

service offerings.[37] The extent to which they will do so will depend on the relationship between the resulting cost savings and the reduction in demand that is occasioned by the change in service. In any event, cable penetration will decline.[38] Moreover, consumers may actually be worse off in the new situation with lower prices than they were previously.[39] To put the point succinctly, it is just as possible for rates to be too low as too high.

Recognition of the difference in the effects of rate regulation on the programming that is available for basic cable services and cable programming services is consistent with the differential treatment of these two types of services in the Cable Act. By using a much lighter hand to oversee the rates for cable programming services, the Commission will have created a "programming diversity" safety valve in the event that the regulated rates for basic cable service are too constrained to permit the operators to profitably carry expensive but highly-

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[37]The programming that is most likely to be adversely affected is the type of "niche" or "minority" programs that have low margins but which people often point to as the symbol of cable's contribution to programming diversity.

[38]Indeed, it would be ironic if cable systems were able to meet one of the Cable Act's definitions of "effectively competitive" by reducing their service quality to the point that, even at regulated rates, fewer than 30 percent of households actually took cable service.

[39]If the demand for cable service is linear and the shift in demand in response to a change in service quality is parallel and proportional to the associated change in program costs, consumers will neither gain nor lose if rates are reduced by regulation. However, consumers will be worse off if program costs decline more rapidly than quality.

valued satellite services on the basic tier. Thus, the Commission should be sensitive not to limit rates for cable program services to the point where the reduction in programming quantity and quality that cable finds it profitable to offer to its subscribers more than offsets the benefits to consumers of any reduction in rates.

Congress seems to have recognized the sensitivity of cable programming services to restrictive regulation in its jurisdictional division of tasks. Although the Cable Act grants authority to regulate rates for basic cable services to local franchising authorities, it reserves oversight of rates for cable programming services to the Commission. This is consistent with the view that each franchising authority could rationally conclude that subscribers in its franchise area would be better off with very low rates for cable programming services, although all subscribers would be worse off if all authorities behaved in this manner. Because of the "public goods" nature of television programs, any group of subscribers might improve its position by "free riding" on the expenditures of subscribers in other areas. But <u>all</u> subscribers cannot succeed in getting a free ride, and in attempting to do so, they may all find their situations have worsened. Nonetheless, no group of subscribers will have an incentive to increase its contribution to the cost of providing programming.[40]

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[40]Franchising authorities could claim the political credit for low subscriber rates without accepting responsibility for the reduction in the supply of programming that results from their

The destructive behavior of local franchising authorities, which results from the "prisoner's dilemma" nature of their relationship, can be overcome either by coordinating their actions or, more plausibly, by giving a single entity authority to act on their collective behalf.[41] By giving the Commission authority over rates for cable program services[42], Congress may have been signaling its concern that excessively low rates could adversely affect the supply of programs to cable program services.[43]

(combined) actions.

[41]Designating a single agent is more plausible because coordinating the behavior of a very large number of franchising authorities is likely to be extraordinarily difficult. Even if agreement could be reached on the appropriate level of rates, enforcing such an agreement among a large number of potential free riders may well be impossible.

[42]"The rates for cable programming services shall be subject to regulation by the Commission...." [Cable Act, Sec. 623 (a)(2)(B)].

[43]This is also consistent with the language of the statute that requires rates for basic cable service to be "reasonable" while requiring rates for cable programming services to be "not unreasonable." It is also consistent with the presence in the list of Factors To Be Considered by the Commission in determining the unreasonableness of rates for cable programming services, but not in the list for basic cable services, of "...the rates for similarly situated cable systems offering comparable cable programming services..." [Cable Act, Sec. 623 (2)(A)]. It should be observed, however, that Congress has not given local franchise authorities unlimited authority over rates for basic cable service. Local regulation of these rates must be undertaken "in accordance with...regulations prescribed by the Commission...." [Cable Act, Sec. 623 (a)(2)(A)].

Determining the Threshold

Given this basis for distinguishing between the regulation of basic and cable programming services, we conclude that only those systems that charge unusually high prices for cable program services should be subject to any Commission oversight. All other systems would be free to price as they chose, subject to the Commission's basic rate and equipment regulations, unbundling requirements, etc. Thus, if the per-subscriber revenue per channel of a system exceeded some threshold rate, the system could be subject to the complaint procedures mandated by the Act and to be adopted by the Commission.

In selecting what the threshold should be, the Commission should weigh the costs to consumers in terms of lost program diversity against the gains to some consumers of lower prices. Because of the apparent sensitivity of the availability of cable programming services to rate regulation, the sensitivity of the value consumers place on cable programming services to their availability, and Congress's apparent concern that the goal of program diversity not be seriously compromised, the Commission should consider a high threshold, such as the lowest per-subscriber revenue per channel paid by the 5 percent of subscribers paying the highest per-channel revenue, i.e., the rate at the 95th percentile of all subscribers.

As with basic rate regulation, the Commission can "fine-tune" this approach by setting different threshold rates within

terms of those characteristics that account for the most important differences across systems. Thus, the Commission could set a 95th percentile rate for each system category.[44]

The rate that should be regulated is the average revenue per subscriber, the average revenues from basic service and equipment, as well as any revenues from equipment required to receive cable programming services as defined in the 1992 Cable Act.[45] Parallel to our discussion of what the definition of "the" basic rate should be, the prices set for cable programming services and equipment are likely not independent of the prices for basic services and equipment. An example may serve to illustrate this point.

Consider two systems, one of which charges $5 for a basic service consisting of five broadcast stations and has an additional charge of $5 for an expanded basic tier consisting of five cable programming services. Consider an otherwise identical system, but one which charges only $.50 for basic service and $9.50 for the

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[44]We expect that the Commission would base its 95th percentile calculations for each category on a sample of cable systems. If this is in fact the case, the Commission should be aware that the results from the sample--particularly within each category--may be quite imprecise. That is, the "true" 95th percentile in each category could be greater or less than that calculated by the Commission. Given the diversity-depressing effects of regulation, we would recommend that the Commission use the within-category sample standard deviation to set the 95th percentile rate at some value higher than that generated by the sample.

[45]This discussion assumes that any equipment that is used only for the provision of cable program services is subject only to "bad actor" regulation. If this equipment is subject to cost-based regulation, however, it would be necessary to "back out" the cost-based rates for equipment in calculating the appropriate per-channel threshold, in the manner discussed above for basic services.

expanded basic tier. If all subscribers to each system take both services, the revenue per subscriber is the same in both systems (i.e., $10).

If the Commission were to look only at the price of the cable programming services following a complaint, it might conclude that the second system was a "bad actor," although there is no difference in the systems from the point of view of consumers who take both services. Because systems with low basic service rates will tend to have high expanded basic rates, the Commission should consider basing its threshold rate on the average revenue per subscriber rather than only on the average revenue per subscriber from non-basic tiers. As applied to this example, the Commission would then conclude that both systems are equally good or bad actors, depending upon where the threshold happens to be. To avoid penalizing systems simply because of the manner in which they market their services, and to avoid discouraging systems from setting a basic rate that is lower than the regulated rate, the "bad actor" rates should be defined in terms of the revenue per subscriber from all tiers containing basic and cable programming services.

In addition to defining the threshold rates on the basis of average revenue, the Commission should calculate the threshold rates on a per-channel basis. Similar to the discussion of the appropriate basic rate definition, a threshold that is defined in terms of the total price for cable programming services will encourage operators at the "edge" of the threshold to reduce the

carriage of some cable programming services to remain below the threshold. By contrast, if the threshold is set on a per-channel basis, the operator will have an incentive to add cable programming services to its offerings, provided that the cost of the service is less than the threshold per-channel rate.

Adjusting the Threshold Over Time

Over time, the costs of cable programming services, the costs of the cable distribution plant, marketing and administrative costs, and the general price level are likely to increase. As a result, an increasing number of cable systems will find that their per-subscriber revenue per channel exceeds the threshold. With an unchanging threshold, more than 5 percent of the subscribers will be served by systems mistakenly characterized as bad actors. One possibility is for the FCC to simply recalculate the 95th percentile rate once every six months or year. However, this has the unfortunate effect of resulting in a lower threshold rate every year because (by definition) at least 5 percent of all subscribers will be served by "bad actors."[46] Taken to the extreme, all systems ultimately may be candidates for bad actor scrutiny, which is inconsistent with our understanding of the regulatory regime that is desired.

To avoid this "ratcheting down" effect, the Commission should consider alternative methods of adjusting the threshold rate over

[46]This ratcheting down would occur because many systems whose rates were found to be above the threshold may be forced to lower their rates to the threshold level.

time. Such methods would account for changes in programming and equipment costs, technical improvements to the cable distribution plant, and changes in the general price level.

One approach would be for the Commission to raise the threshold by the median or average annual percentage increases of "good actor" systems. This approach would then account for changes in programming costs as well as other operating and non-operating costs. However, even good actors will not be able to increase rates above the threshold; if programming or other costs would have increased more rapidly but for the bad-actor threshold, some programming services or capital improvements may be consequently foregone to keep the increase low enough to remain below the threshold.[47]

To solve this problem, the Commission could permit an annual "open season," for example, a three-month period early in the year, during which cable systems would be permitted to freely reprice their non-basic services and equipment. At the end of the open season, the FCC would conduct a survey to estimate the per-subscriber revenue per channel for each system in the survey. The systems would then be placed in the appropriate system categories, and for each category, the Commission would recalculate the 95th

[47]It is true that if all systems coordinated their rate increases to cover these cost increases, the problem described here would be moot: All systems would raise their per-subscriber revenues per channel simultaneously and the 95th percentile would automatically be higher than before. But each system behaving independently may believe that the largest possible increase is that which may raise the per-subscriber revenue per channel to the lower threshold.

percentile rate. One limitation of this approach is that it delays any "bad actor" complaints until the Commission has compiled the results of its surveys. Thus, consumers will not be able to file a valid complaint before the FCC until four to six months after the beginning of an open season.

The Commission may want to consider a two-part adjustment process. The threshold rate would be adjusted each year by the "good actor" increase in per subscriber revenue per channel. Then every three years (for example), the Commission would conduct an open season. Such an approach would seem to balance the Congressional mandate to the Commission that it more closely scrutinize those systems with excessively high prices and the mandate not to discourage higher-quality cable service.

REGULATING THE RATES FOR LEASED COMMERCIAL ACCESS

Section 9 of the Cable Act of 1992 gives the Commission authority to "determine the maximum reasonable rates that a cable operator may establish...for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of rates from subscribers by the cable operator for such use...and to establish reasonable terms and conditions for such use, including those for billing and collection...." It also orders the Commission to "establish rules for determining maximum reasonable rates...[and] for establishing terms and conditions...." The Section also adds to the purposes of

Section 612 of the Communications Act "to promote competition in the delivery of diverse sources of video programming."

In its Notice, the Commission quotes the language of the leased access provisions of the 1984 Cable Act, which indicate that leased access is to be undertaken in a manner "consistent with the growth and development of cable systems." It interprets these provisions to mean that "the terms of a leased access arrangement were not to adversely affect the operation, financial condition, or market development of the system." The Commission goes on to note that the 1992 Act leaves this language unchanged and recognizes that there may be a conflict between this language and the statutory objective of promoting diversity. As it observes:

> ...if rates for leased access are low enough, unaffiliated programmers may seek to move their program offerings from other channels to those set aside for leased access, thereby diminishing the number of channels available for leased access without adding to the diversity of programming offered on the system. We seek comment on the probability of such migration occurring, the likely impact of such actions, and whether there is any need to take regulatory action at this time to prevent it.[48]

In its Notice, the Commission identifies "three alternative standards for determining maximum reasonable rates for leased commercial access and for billing and collection services: reliance on benchmark rates based on costs of typical cable systems, reliance on...cost-of-service principles,...and reliance on the marketplace where effective competition exists. A fourth possibility...would be for the Commission to establish a mechanism

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[48]Notice, paragraph 161.

or formula under which subscriber rates for the basic service tier and/or cable programming services could be used to compute a rate for leased commercial access." If the cost-of-service benchmark were chosen, access rates "would be based on all direct costs, an allocation of the joint and common costs of access and of providing other cable services, an allocation of general and administrative overheads, and a reasonable profit...."

Analysis

Proposals to require cable operators to make a significant portion of their channel capacity available for lease by others have existed for more than 20 years.[49] However, the "common carrier," or "partial common carrier," models for cable were largely rejected until the enactment of the Cable Act of 1984, which provided that cable operators make a significant portion of their channel capacity available for lease by others. Even then, however, operators were given significant discretion in setting the terms and conditions for commercial leased access.

Before considering the questions raised by the Commission regarding the appropriate manner in which to regulate commercial leased access under the 1992 Cable Act, it is useful, therefore, to review why leased access has played such a limited role in the past. In the course of doing so, we identify a number of adverse

[49]These proposals are reviewed in S.M. Besen and L.L. Johnson, An Economic Analysis of Mandatory Leased Access for Cable Television (RAND Report R-2989-MF, December 1982).

effects that excessive reliance on leased access may have on the welfare of the viewing public.

One possible effect of mandating leased access is that the substantial capital investments required for the construction of cable systems might not be forthcoming if cable operators are prevented from contracting for the program services that would be carried on a large proportion of the capacities of their systems. A cable operator is more likely to be willing to construct a system, or to construct a larger system, if it knows that it can itself contract for programming to fill its channels. An operator that must lease all or most of its capacity to others will, for that reason, be hesitant to make investments in the capacity of its system.

Second, it is now generally recognized that an arrangement that required most cable programmers to lease channel capacity at rates that covered fully distributed costs would adversely affect the diversity of programming available to viewers. This is because it would lead to the exclusion of "minority" programmers, those who could cover the <u>additional</u> cost of a cable channel but not its <u>average</u> cost. Cable operators are willing to provide "access" to such programmers by carrying them as part of their basic or enhanced basic services because, under present (non-common carrier) arrangements, it is profitable for them to do so. The reason is that a cable operator's profitability is enhanced if the implicit access fees that a programmer pays exceeds the <u>marginal</u> cost of a

channel.[50] Thus, even if a programmer cannot pay average cost, it will be carried if it can pay marginal cost.[51] As a result, some program services that cable operators can profitably carry at present would be unable to lease channels that were priced at fully allocated cost.

To be clear, not every programmer will be able to pay, as its implicit access fee, the marginal cost of a channel. The reason is, of course, that the operator's revenues must be sufficient to cover the total cost of constructing and operating the system. With declining average (per channel) cost, marginal cost will be less than average cost, so that some programmers must pay an implicit access fee that exceeds the marginal cost of a channel if total costs are to be covered. Moreover, there may be no single implicit access charge that would permit a cable operator to cover its costs. In such a case, no arrangement in which all cable programmers pay the same fee equal to the average cost of system operation would be viable.[52]

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[50]See Besen and Johnson, op.cit. The implicit access fee is the amount the cable operator retains from the carriage of a program service after making all required payments to the programmer. It consists of all additional subscriber and local advertising revenues, if any, minus either the per-subscriber payment or share of revenues that must be rebated to the programmer.

[51]Marginal cost is the cost of adding a channel to a cable system. Under present technology, marginal cost is below average cost.

[52]See A.E. Kahn, The Economics of Regulation: Principles and Institutions, Volume I (New York: John Wiley, 1970), p. 132, for a discussion of this issue.

Third, as the Commission observes in its Notice, making a portion of channel capacity available at average cost could result in the migration to leased access channels of some cable programmers whose services are currently being carried. Indeed, it seems likely that the migrants would be precisely those programmers whose presence on the operator's lineup make it possible for the operator to cover its costs of system construction.

If some of the channel capacity of a system is priced at average cost, migration is attractive to those programmers who are currently paying an implicit access fee that exceeds average cost. Competition for access channels will therefore result in the migration of those programmers who are currently paying the highest implicit access fee.[53] If the number of programmers who migrate is large, and it will be if the number of channels affected is large, the diversion of the access fee that these programmers pay may be sufficiently large to affect the investment decisions of cable operators. They may be reluctant to rebuild the capacity of their present systems when their existing plant must be replaced,

[53]There are a number of ways in which this might occur. One is for leased channels to be acquired by resellers who, in effect, auction these channels among program services. Another would be for those programmers who place the highest value on the leased access channels to acquire leases from those who acquire them on a first come-first served basis. Finally, those programmers who are fortunate enough to acquire the leased access channels can choose to shift to the carriage of those program services that generate the largest profits from doing so.

or they may be unwilling to undertake planned capacity expansions.[54]

Clearly, the extent to which these effects are felt will depend both on the number of channels available for lease, which is specified in the statute, and on the rates that are established by regulation for access. If the number of leased access channels is small and/or access fees are high, these adverse effects will be small. However, given the relatively large number of channels that are provided for leased access in the Cable Act of 1984, if access rates are set too low the negative effects can be large.[55]

Although it is difficult to be certain, it appears likely that the distribution of implicit access fees among existing program services is quite skewed. That is, a few cable services generate relatively large net revenues for the cable operator while many others make relatively limited contributions to the fixed cost of constructing and operating a cable system.[56] In this case, the migration of even a relatively small number of program services to

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[54]Because of economies of scale across channels in cable system construction, access fees might be higher if channel capacity is affected by the existence of leased access requirements.

[55]We do not mean to suggest that there can never be benefits to consumers from leased access. We do, however, mean to suggest that there are offsetting costs and, if access rates are set too low, these costs can exceed the benefits to consumers.

[56]This is consistent with the earlier point that the cable operators currently find it profitable to carry <u>some</u> services so long as the implicit access fees they pay cover at least the marginal cost of a channel, even if the fees fall well below average. At the same time, however, operators must collect higher fees on <u>other</u> channels if they are to cover their total costs.

leased access channels will have large adverse effects.[57] As a result, these adverse effects can be prevented only if the leased access fees are set at a level that is similar to the implicit fees that these services currently pay.

We do not mean to suggest that the migration of a small number of program services to leased access will lead to the demise of the cable industry. However, given the relatively large amount of channel capacity for which leased access is provided under the 1984 Cable Act, and given what appears to be a highly skewed array of implicit access fees, the financial impact of the migration that could result if leased access fees were set at average cost could be very large and adverse to the operator.

Another way to make this point is to observe that the Commission cannot evaluate the impact of any leased access fee without regard to the proportion of the capacity of the cable system that would be affected and without regard to the nature and identity of the likely migrants. If even a few "important" cable services were to migrate to leased access, the financial effects on cable operators could be significant. It is for this reason that we believe that the Commission cannot set leased access rates at or near the average cost of a cable system without adversely affecting "the operation, financial condition, or market development of the system." At the very least, there would be substantial risks of adverse consequence if the Commission were to do so.

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[57]Recall that the services most likely to migrate are those that currently pay the highest implicit access fees.

As a result of the above analysis, we believe that the Commission should not set maximum reasonable rates for leased commercial access on the basis of cable system costs, whether the costs of typical cable systems or the costs of a particular cable system.[58] Moreover, we do not know whether the leased access rates currently being charged by systems that are subject to effective competition under the terms of the Cable Act of 1992 provide an adequate benchmark. Instead, consistent with its expressed concern about the effects of program service migration, we believe the Commission should set maximum access fees at a level that will discourage such migration.[59] This would involve setting the maximum at or near the highest implicit access fees that are currently being charged.

The proposed approach would have three effects. First, cable systems might well find it desirable to charge less than the maximum fee to some channel lessees just as they currently find it profitable to accept relatively low implicit access fees from some cable programmers. One reason they might prefer this arrangement is because they do not want to identify an access programmer's offerings as part of their own service, but there may be others.

Second, when a programmer whose service is currently being carried by an operator chooses to migrate to leased access, we can

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[58]Our concerns here are in addition to those expressed above about cost-based regulation more generally.

[59]Although the Commission discusses migration in the Notice, its concerns about migration do not appear to be reflected in its various proposals about how to regulate access fees.

be certain that the adverse effect on the financial condition of the cable operator will be limited. This is because the programmer will be paying a fee that is not much different from the implicit fee it is currently paying.

Third, some new cable program services may choose to pay the access fee because doing so offers higher profits than the implicit access fee the cable operator requests.[60] Although this may have an adverse effect on future cable system profitability, it will not prevent the operator from recovering the cost of construction and operation of the system it already has in place.

[60]Perhaps more likely, the access fee will place a ceiling on the implicit access that the operator can charge.

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1985–1988	Co-editor, *Rand Journal of Economics*
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1972–1978	The Rand Corporation
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Member, Board of Editors, *Information Economics and Policy*, 1993–present.

Member, Advisory Board, Information Infrastructure Project, Science, Technology, and Public Policy Program, John F. Kennedy School of Government, Harvard University, 1991–present.

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Member, Office of Technology Assessment Advisory Panel on Communications Systems for an Information Age, 1986–1988.

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